78-1933

In the

Supreme Court of the United States

1978 Term

No. [redacted]

STEVEN H. MONTGOMERY, Individually, and d/b/a
LAMINATING COMPANY OF COLORADO,
and d/b/a
AMERICAN LAMINATING COMPANY,
PETITIONER,

v.

CENTURY LAMINATING, LTD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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LIST OF AUTHORITIES CITED

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v.

CENTURY LAMINATING, LTD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

STEVEN H. MONTGOMERY, individually and d/b/a LAMINATING COMPANY OF COLORADO, and d/b/a AMERICAN LAMINATING COMPANY, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on April 2, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 595 F.2d 563 and is printed in Appendix A hereto, infra page A-1. The judgment of the United States District Court for the District of New Mexico is printed in Appendix B hereto, infra page B-1.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was made and entered on April 2, 1979 (Appendix A, infra page___). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

A jury verdict was returned against the Defendant-Appellant, the Petitioner herein. Subsequently, the Petitioner filed a Motion for Judgment *non obstante veredicto* and the Respondent filed a Motion Seeking Injunctive Relief. Thereafter, but prior to the trial court's ruling on the then pending motions, the Petitioner filed a Notice of Appeal. The trial court denied the Petitioner's Motion for Judgment *non obstante veredicto* and granted the Respondent's Motion for an Injunction. On appeal, the Court of Appeals for the Tenth Circuit concluded that the Notice of Appeal was premature and, therefore the Court of Appeals was without jurisdiction to hear the merits of the case. The appeal was dismissed for want of jurisdiction. The question presented is:

Where a Notice of Appeal is filed prior to the entry of a final judgment, may an appellate court accept the notice as if it were filed for review of the final judgment and exercise jurisdiction pursuant to 28 U.S.C. §1291, or does the premature filing deprive the appellate court of jurisdiction?

STATUTES AND FEDERAL RULES INVOLVED

The pertinent portions of Rule 4 of the Federal Rules of Appellate Procedure and 28 U.S.C. §1291 are set forth in the Appendix at pages C-1 and D-1 respectively.

STATEMENT OF CASE

This action was originally filed in the New Mexico state courts and removed to the United States District Court

for the District of New Mexico. The Plaintiff, CENTURY LAMINATING, LTD., sought damages and injunctive relief for the breach of a contract. The Defendant, STEVEN H. MONTGOMERY, individually and d/b/a LAMINATING COMPANY OF COLORADO, and d/b/a AMERICAN LAMINATING COMPANY asserted a counterclaim alleging violation of Federal anti-trust laws and breach of contract.

On May 9, 1977, following a trial to a jury, the Honorable J. Vearle Payne, presiding, the jury returned a verdict awarding monetary damages to the Plaintiff. On May 11, 1977, judgment was entered thereupon. Thereafter on May 19, 1977, the Defendant filed a Motion for Judgment *non obstante veredicto*. On the same date, the Plaintiff filed a Motion Seeking Injunctive Relief. On June 10, 1977, the Defendant filed a Notice of Appeal, while the Defendant's Motion for Judgment *non obstante veredicto* and the Plaintiff's Motion for Injunctive Relief were still pending. The Court denied the Motion for judgment *non obstante veredicto* on June 19, 1977, and it granted the Motion for Injunctive Relief on August 9, 1977. On September 7, 1977, the Defendant filed a Motion for Stay of the Injunction pending appeal, which motion was denied on November 9, 1977. The Defendant did not file an additional Notice of Appeal following the original notice filed on June 10, 1977.

On appeal, the Defendant, Petitioner herein, urged a number of grounds for reversal of the trial court judgment. These issues, which are not pertinent herein, were thoroughly briefed by both parties. The Plaintiff filed a motion to dismiss the appeal as being untimely. The motion was denied by the Court of Appeals "with leave to renew the motion at the time of oral argument." The motion was was renewed by the Plaintiff at oral argument, and it is on the basis of that motion that the Court of Appeals

concluded that it was without jurisdiction to hear the appeal on the merits.

In essence, the Court of Appeals determined that the finality requirement of 28 U.S.C. §1291 is absolute, and that the filing of a Notice of Appeal prior to the entry of a final judgment is a nullity. The Court of Appeals began its analysis with the premise that the Court has only such jurisdiction as is conferred by statute and that the Court's jurisdiction is limited to appeals from final decisions. 28 U.S.C. §1291; *United States v. Nixon,* 418 U.S. 683, 690 (1974). The Court continued by defining a final decision as being ". . . one which ends the litigation on the merits and leaves nothing for the Court to do but execute judgment."*Century Laminating, Ltd. v. Montgomery,* 595 F.2d 563, 565 (1979). The Court distinguished the present case from its decision in *Morris v. Uhl & Lopez Engineers, Inc.,* 442 F.2d 1247 (10th Cir. 1971), based on a finding in *Morris* that the various claims and judgments therein were separable pursuant to Rule 54 (b), Fed. R. Civ. P.

The Court then went on to state that where a trial court retains power to review its judgment (in this case the Motion for Judgment *non obstante veredicto* provided the Court with such power) the judgment is not final. Since the judgment was not final, the Defendant's premature Notice of Appeal was an attempt to appeal a non-final order and was, thus, a nullity. The Court concluded that the premature Notice of Appeal did not transfer jurisdiction to the Court of Appeals.

The Court stated that the Defendant did not loose his right to appeal. Rather, the Defendant could have perfected his appeal by filing a Notice of Appeal within thirty (30) days of the entry of the Court's denial of the Motion for Judgment *non obstante veredicto.*

The Court of Appeals choose not "to erode the finality doctrine by indirection." Citing cases from other circuits holding to the contrary, the Court concluded that "Litigants — appellees as well as appellants — have a right to rely upon conformity by their adversaries with applicable statutes and rules especially when compliance with the rule is a jurisdictional prerequisite to the appeal itself." *Century Laminating, Ltd., supra,* at 568.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it creates a conflict between circuit Courts of Appeal regarding the procedural propriety and effectiveness of the filing of a Notice of Appeal prior to the entray of a final, appealable judgment by a trial court.

At the outset, the Petitioner must note that he does not contest the fact that the judgment entered on the jury verdict on May 11, 1977 was not a final judgment as the Petitioner had filed his Motion for Judgment *non obstante veredicto.* However, it is the Petitioner's position that the filing of the Notice of Appeal prior to the Court's ruling on Petitioner's Motion for Judgment *non obstante veredicto* did not create a fatal impediment to the Court's jurisdiction to review the case on its merits. Although the Notice of Appeal was filed prematurely, it properly advised the Plaintiff that an appeal was being taken. Since the trial court denied the Motion for Judgment *non obstante veredicto,* and did not alter the issues on appeal, the Court of Appeals should have accepted jurisdiction. Had it taken such action, the Court of Appeals would not have prejudiced the rights of the Plantiff.

One must start from the premise, as did the Court of Appeals, that the Courts of Appeal have jurisdiction to review the final orders of district courts. 28 U.S.C. §1291.

"The basic policy considerations underlying the limitation that a final judgment is a prerequisite to appealability are the excess inconvenience and costs occasioned by piecemeal review on the one hand, and the danger of denying justice by needless delay on the other. *Gillespie v. United States Steel Corp.* 1964 379 U.S. 148, 152-153, 85 S.CT. 308, 311, 13 L.Ed. 2d 199, 203; *In re Forstner Chain Corp.,* 1st Cir. 1949, 177 F. 2d 572, 575." *Markham v. Holt,* 369 F. 2d 940, 942 (5th Cir. 1966). Additionally this Court has stated that the finality rule is intended to prevent appellate court intervention into trial court proceedings. *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541.

In the decision before this Court the Court of Appeals approached the resolution of the question by considering the premature filing of a Notice of Appeal as an attempt to oust the trial court of jurisdiction to complete its proceedings. Seemingly in an attempt to protect trial courts from such an ouster, the Court of Appeals ruled that in almost all circumstances a premature Notice of Appeal is of no effect. The Court concluded that an execption existed in *Morris, supra.* In *Morris,* the trial court failed to certify the primary claim as being separable pursuant to Fed. R. Civ. R., Rule 54(b). It is interesting to note that the Tenth Circuit remanded the case to correct the mere "lack of technical formal finality." *Morris, supra,* at 1250. [Emphasis supplied].

The Petitioner has no quarrel with the proposition that a Notice of Appeal should not be utilized for the purpose of preventing a trial court from proceeding, or from reviewing its own proceedings, in order to correct error at the trial level. In fact, the Tenth Circuit itself ruled that such an attempted ouster is of no effect. ***Arthur Anderson and Co. v. Finesilver,*** **546 F. 2d 338, (10th Cir. 1976), cert denied, 429 U.S. 1096.**

In a well reasoned opinion, Circuit Judge Thornberry stated, speaking for the Court of Appeals for the Fifth Circuit, "this Court has consistently adhered to the policy of exercising all proper means to prevent the loss of valuable rights when the validity of an appeal is challenged not because something was done too late, but rather because it was done too soon." *Markham v. Holt,* 369 F. 2d 940 (1966). Furthermore Circuit Judge Van Dusen stated in *Hodge v. Hodge,* 507 F. 2d 87, 89 (3rd Cir. 1975), "So long as the order is an appealable one, and the non-appealing party is not prejudiced by the prematurity, however, the Court of Appeals should proceed to decide the case on the merits rather than dismiss on the basis of such a technicality." Recently the Court of Appeals for the Second Circuit stated:

> Although the filing of the Notice of Appeal within the prescribed time limits is a jurisdictional prerequisite to the appeal itself, the better rule is that in the absence of prejudice to the appellee, the Court should treat a premature appeal as from a final judgment so as to avoid denial of justice, expense, and inconvenience. This rule applies to appeals that are premature not only because they were filed between the pronouncement of judgment and the entry of judgment [citation omitted], but also because they were filed while a Rule 59 was pending. [Citations omitted].

Yaretsky v. Blum, 592 F. 2d 65 (2nd Cir. 1979); Accord, *Eason v. Dickson,* 390 F. 2d 585 (9th Cir. 1968), cert. denied, 392 U.S. 914; *Richerson v. Jones,* 551 F. 2d 918 (3rd Cir. 1977). The Petitioner strongly urges that such a rule is no less applicable under the present circumstances, where a Notice of Appeal was filed while a Motion for Judgment *non obstante veredicto* was pending.

The matters raised in this petition present a clear cut conflict in the circuits. Although the matter to be decided by this Court may not be considered to be of national im-

portance, it is the type of housekeeping decision that must be made from time to time to prevent disorder in, and eventual chaos, within the Federal Court System. The Petitioner has indicated that the Second, Third, Fifth, and Ninth Circuits consider the premature filing of a notice of appeal to be proper to confer jurisdiction upon the Appellate Court and only the Tenth Circuit has found that a premature filing of a notice of appeal deprives the Court of Appeals of jurisdiction. The Eighth Circuit Court of Appeal, in *Keith vs. Newcourt, Inc.*, 530 F.2d 826, (1976) reached the decision that a notice of appeal filed during the pendency of a new trial *which was subsequently granted* was not final and the appeal must be dismissed, [Emphasis supplied]. It is clear then that many Courts of Appeal, the Tenth Circuit to the contrary notwithstanding, have addressed the issue of whether the premature filing of a notice of appeal was prejudicial to the opposing party. This Court needs to rule upon this particular issue so that timely filing of a notice to appeal does not become a technical nightmare but a matter of notifying the other party that an appeal is to be forthcoming. To allow the premature filing of a notice of appeal to deprive a litigant of his rights to appellate review would serve no purpose especially in light of the fact that an opposing party has not been thereby prejudiced. If all parties are on notice that an appeal will be forthcoming, the Court of Appeal can consider the premature filing of a notice of appeal as merely the indication of intent awaiting the final order of the trial court. There must come a time when technicalities must fall in favor of justice and fair play especially when the act is premature rather than tardy. Surely the filing of the premature Notice of Appeal indicates diligence and respect for the rules of procedure rather than disregard.

The Petitioner can determine no policy that would justify the dismissal of an appeal where a good faith attempt

has been made to properly perfect such a proceeding. The fact that a Notice of Appeal has been filed prematurely will not oust a trial court from finalizing its proceedings. Once trial court proceedings are final, the premature Notice of Appeal can be taken as directed to the appealable final order. Accord, *Eason v. Dickson,* 390 F. 2d 585 (9th Cir. 1968). The requirement of filing a second notice of appeal, under such circumstances, where the appellee has not been prejudiced by the first notice, whould serve no purpose other than to provide in duplicate that which has previously been provided. By its action herein, the Court of Appeals for the Tenth Circuit has taken a position contrary to a number of Circuit Courts of Appeal. The issue presented is one that has been addressed on a number of occasions, and in all likelihood, will require such attention in the future. It is thus a matter deserving of resolution by this Honorable Court.

CONCLUSION

For the reasons set forth above, it is respectively submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CENTURY LAMINATING, LTD.,
Plaintiff-Appellee,

v.

STEVEN H. MONTGOMERY, individually and d/b/a LAMINATING COMPANY OF COLORADO, and d/b/a AMERICAN LAMINATING COMPANY,
Defendant-Appellant.

No. 77-1541

Appeal from the United States District Court for the District of New Mexico (DC. 76-197-P)

Gregory G. Vernon, Richard B. Sartore, Wesley W. Hoyt and William J. Graveley of Vernon, Sartore & Hoyt, Denver, Colorado, submitted on briefs for Defendant-Appellant.

William J. Lock of Robinson, Stevens & Wainwright, Albuquerque, New Mexico, for Plaintiff-Appellee.

Before SETH and BREITENSTEIN, Circuit Judges, and STANLEY, Senior District Judge*.

*Of the District of Kansas, sitting by designation.

STANLEY, Senior District Judge.

On May 11, 1977, judgment was entered on a verdict in favor of the plaintiff-appellee (Century). On May 19, the defendant-appellant (Montgomery) filed a motion for judgment notwithstanding the verdict. Century, on the same date, filed a motion to enjoin the violation by Montgomery of the agreement which was the fountainhead of the litigation. On June 10, Montgomery filed a notice of appeal, " . . . from the final judgment entered on the 11th day of May, 1977." On June 10, when the notice of appeal was filed, Montgomery's motion for judgment n.o.v. and Century's motion for an injunction were pending in the district court. Montgomery's motion for judgment n.o.v. was denied June 19, 1977 and Century's motion for an injunction was granted August 9. On September 7, Montgomery filed a motion for stay of the injunction pending appeal, which was denied November 9. No appeal was taken from any of the orders of the district court made after the entry of judgment on May 11.

Century's motion to dismiss the appeal as untimely was denied by us " . . . with leave to renew the motion at the time of oral argument, the jurisdictional question to be considered with the other issues raised on appeal." The motion was renewed at the time of oral argument and the jurisdictional question must be answered before we may proceed to consideration of the other issues, for, as Judge Murrah once said, " . . . if the appeal is untimely, jurisdiction is lacking and that ends the matter." *Director of Revenue, State of Colorado v. United States,* 392 F.2d 307 (10th Cir. 1968).

United States Courts of Appeal have only such jurisdiction as Congress specifically has given them and the grant of appellate jurisdiction, with exceptions not here pertinent, is limited to appeals from final decisions of those courts. 28 U.S.C. § 1291; *United States v. Nixon,* 418 U.S. 683, 690 (1974).

A final decision is defined as ". . . one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States,* 324 U.S. 229;*Kappelman v. Delta Airlines, Inc.,* 539 F.2d 165 (D.C. Cir. 1976), *cert denied,* 429 U.S. 1061; *Dunlop v. Ledet's Foodliner of Larose, Inc.,* 509 F.2d 1387 (5th Cir. 1975); *Donovan v. Hayden, Stone Inc.,* 434 F.2d 619 (6th Cir. 1970). The rule requiring finality of a judgment or order as a prerequisite to appeal is dependent upon statute. 28 U.S.C. §1291. Any exceptions must be made by Congress, not by the courts, although to the courts falls the responsibility of deciding whether a judgment or order is final and therefore appealable. It is our duty to resolve that question. *United States v. Grand Jury,* 425 F.2d 327 (5th Cir. 1970); *Levin v. Baum,* 513 F.2d 92 (7th Cir. 1975).

This is not such a case as *Morris v. Uhl & Lopez Engineers, Inc.,* 442 F.2d 1247 (10th Cir. 1971). That case involved multiple claims and multiple parties. Morris, while an employee of one Gottlieb, was injured by the fall of a utility pole which, as a result of decay, broke off at its base. The pole was federally owned and was located on land owned by the United States. It had been inspected and tested by Uhl & Lopez. Morris sued the United States under the Federal Tort Claims Act and Uhl & Lopez for negligence. The United States settled with Morris, cross-claimed against Uhl & Lopez for indemnity and impleaded Gottlieb as a third-party defendant. Morris' claim against Uhl & Lopez was separately tried and the trial court found Morris guilty of contributory negligence and dismissed his claim. Morris filed a notice of appeal before the cross-claim and the third-party complaint had been disposed of. No order had been entered under Rule 54(b), Fed.R.Civ.P., making the jugment against Morris separably final. This court entered an order authorizing the trial court to entertain a motion giving the Morris judgment separable finality and

expressly retaining "jurisdiction of the cause for all other purposes". The trial court then dismissed the indemnity claims and Morris proceeded on appeal without filing another notice of appeal "in reliance upon the order of this court retaining jurisdiction". 442 F.2d at p. 1250.

In denying the motion of Uhl & Lopez to dismiss the appeal as premature we said,

> In our view, the notice of appeal had capacity in the circumstances to provide jurisdictional basis that would entitle this Court to refuse, as it did, to make dismissal of the appeal out-of-hand and to allow the notice to ripen into full effectiveness as to the rendered judgment, *since it seemed apparent that the judgment would remain unchanged in its form and content;* that its lack of technical formal finality would become dispelled in natural course and within a not undue period of time; and that no prejudice could result to any one from so dealing with the notice. [444 F.2d at p. 1250] (Emphasis supplied).

In *Uhl & Lopez* the appealed judgment was entered on the principal claim, a claim separable from the still unresolved claims among the interpleaded parties. All that remained for disposition were the indemnity claims and this was the situation when the notice of appeal was filed. The judgment appealed from lacked finality only because of the failure of the trial court to comply with the formalities of Rule 54(b) and this court expressed the belief that no disposition of the indemnity claims would alter the form and content of the judgment appealed from. In the case at bar, on the date that Montgomery filed his notice of appeal, his motion for judgment n.o.v. was pending—the disposition of which clearly could have changed the form and content of the judgment.

Rule 4(a), Fed.R.App.P., requires that in a civil case the notice of appeal must be filed within thirty days from

the date of the judgment or order appealed from. The rule specifically provides that the running of the time for filing a notice of appeal is terminated by the timely filing of a motion for judgment n.o.v. " . . . and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of [an order] granting or denying a motion for judgment under Rule 50 (b)." The requirement of Rule 4, Fed. R. App.P., is mandatory and jurisdictional. *Gooch v. Skelly Oil Co.,* 493 F.2d 366 (10th Cir. 1974), *cert. denied,* 419 U.S. 997. And see *United States v. Robinson,* 361 U.S. 220, 228.

The circuits are not in agreement as to whether the filing of a notice of appeal automatically divests a district court of jurisdiction and transfers jurisdiction to the court of appeals. See e.g., *First Nat'l Bank of Salem, Ohio v. Hirsch,* 535 F.2d 343 (6th Cir. 1976);*United States v. Lafko,* 520 F.2d 622 (3d Cir. 1975); and *Williams v. Bernhardt Bros. Tugboat Serv., Inc.,* 357 F.2d 882 (7th Cir. 1966). We have held that a district court retains jurisdiction if the notice of appeal is untimely filed or refers to a non-appealable order. *Arthur Andersen & Co. v. Finesilver,* 546 F.2d 338 (10th Cir. 1976), *cert. denied,* 429 U.S. 1096. And see *Hodgson v. Mahoney,* 460 F.2d 326 (1st Cir. 1972), *cert. denied,* 409 U.S. 1039; *Ruby v. Secretary of United States Navy,* 365 F.2d 385 (9th Cir. 1966), *cert. denied,* 386 U.S. 1011.

Where the trial court has power to further review its judgment it cannot be said that the judgment is final as long as it is being considered by the court. *Suggs. v. Mutual Ben. Health & Acc. Ass'n.,* 115 F.2d 80 (10th Cir. 1940). An attempt to appeal a non-final decision of a district court remains just that, an attempt. It is a nullity and does not divest the trial court of its jurisdiction. *Euziere v. United States,* 266 F. 2d 88 (10th Cir. 1959), *vacated on other grounds,* 364 U.S. 282. In our view, when one of the mo-

tions enumerated in the second pargraph of Rule 4(a), Fed. R.App.P., is timely filed after the entry of judgment in a civil case the judgment does not become final until the motion has been ruled upon by the trial court. A notice of appeal filed while such a motion is still pending in the trial court is prematurely filed and does not transfer jurisdiction to the court of appeals.

In the case of *Barnett v. Life Ins. Co. of the Southwest,* 562 F.2d 15 (10th Cir. 1977), the defendant had filed a motion for judgment n.o.v. after judgment had been entered and after the plaintiff had filed its notice of appeal. The trial court granted judgment n.o.v. and on appeal the plaintiff urged that the trial court lacked jurisdiction to consider the motion for judgment n.o.v. We said,

> It is apparent from the record that the trial court had not concluded its consideration of the jury verdict at the time appellant's first notice of appeal was filed. The matter thus was not final, and the notice of appeal filed in an attempt to prevent further consideration of the verdict by the trial court was not effective.

The finalilty requirement of 28 U.S.C. § 1291 must have been satisified as of the date a notice of appeal is filed. *Biliske v. American Nat'l. Bank & Trust Co. of Shawnee,* Nos. 77-1379, 77-1380, and 77-1448 (10th Cir. Oct. 5, 1977). On June 10, when Montgomery filed his notice of appeal, his motion for judgment n.o.v. was pending. It was not ruled upon until June 16 when it was denied. A motion for judgment n.o.v. is not addressed to mere matters of form but raises questions of substance since it seeks alteration of rights already adjudicated. The filing of one of the motions enumerated in the second paragraph of Rule 4(a) does not merely result in mechanical enlargement of the time within which an appeal must be taken. The pendency

of any such motion vests in the trial judge continued control over the judgment and until disposed of the judgment does not become final for the purpose of appeal. *Leishman v. Associated Wholesale Elec. Co.,* 318 U.S. 203; *Green v. Reading Co.,* 180 F.2d 149 (3d Cir. 1950). *Barnett v. Life Ins. Co. of the Southwest, supra.*

We are disinclined to erode the finality doctrine by indirection. For,

> . . . allowing appeals of right from nonfinal orders that turn on the facts of a particular case thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule—"that of maintaining the appropriate relationship between the respective courts. . . This goal in the absence of most compelling reasons to the contrary, is very much worth preserving."

Coopers & Lybrand v. Livesay, 437 U.S. 463; *Parkinson v. April Indus., Inc.,* 520 F.2d 650 (2d Cir. 1975). And see *Siegal v. Merrick,* ..... F.2d ....., 47 L.W. 2418 (2d Cir. 1978). Our position, we think, is in accord with that of the Supreme Court in *Coopers & Lybrand v. Livesay* and as voiced in *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, the case in which the collateral order doctrine was forged. There the court said at page 546,

> The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal.

Although the premature notice of appeal did not transfer jurisdiction to this court, Montgomery did not lose his right to appeal. Within thirty days after entry of the order denying the motion for judgment n.o.v. he could have filed

a new notice of appeal effectively transferring jurisdiction to this court. The duty devolves upon litigants, especially appellants, to ascertain the state of the record and to make certain that it is in proper form for an appeal. *Green v. Reading, supra.*

Montgomery urges that we look beyond the technical requirements of Rule 4, Fed.R.App.P., and allow the appeal in order to prevent injustice in light of the fact that Century has neither claimed nor made a showing that it has in any way been prejudiced by the premature filing of the notice of appeal. Like all jurisdictional requirements the one Montgomery failed to meet is a technical one. However, it is based on important substantive policies regarding the finality of judgments and affects the very jurisdiction of this court.

Some circuits have ruled that when a Rule 4(a) motion is timely filed any judgment theretofore entered ceases to be final until the motion is ruled upon and until then any appeal from the judgment is premature and subject to dismissal. *Wiggs v. Courshon,* 485 F.2d 1281 (5th Cir. 1973); *Keith v. Newcourt, Inc.,* 530 F.2d 826 (8th Cir. 1976). In other circuits it has been held that a premature appeal taken from a judgment which is not final, but which is followed by an order that is final, may be regarded as an appeal from the final order in the absence of a showing of prejudice to the other party. See e.g., *Eason v. Dickson,* 390 F.2d 585 (9th Cir. 1968); *cert. denied,* 392 U.S. 914; *Richerson v. Jones,* 551 F.2d 918 (3d Cir. 1977). In the very recent case of *Yaretsky v. Foley,* .....F. 2d ..... (2d Cir. 1979), the court in its opinion said,

> . . . the better rule is that in the absence of prejudice to the appellee, the court should treat a premature appeal as from a final judgment so as to avoid denial of justice, expense, and inconvenience.

We cannot agree that this is the better rule. Litigants — appellees as well as appellants — have a right to rely upon conformity by their adversaries with applicable statutes and rules, especially when compliance with the rule is a jurisdictional prerequisite to the appeal itself. Expense, inconvenience, and what a litigant may believe to be injustice, are unavoidable consequences of failure to abide by a statute or rule, e.g., a statute of limitation. There is some virtue in finality — in an end to litigation. When a notice of appeal is prematurely filed the case is not in limbo. The trial court retains jurisdiction and a timely appeal may be taken from the final judgment when entered.

The defendant suggests that his motion to stay the injunction, filed in the district court September 7, more than thirty days after denial of his motion for judgment n.o.v., should be treated as a sufficient and timely notice of appeal — sufficient because it contains reference to an appeal having been taken from the May 11th judgment, and timely because filed within thirty days from the date of entry of the order granting the injunction. The motion to stay was, by its own recitations, filed under the provisions of Rule 62(c), Fed.R.Civ.P., which has reference to an appeal from a final judgment granting or denying an injunction. Both Civil Rule 62(c) and Appellate Rule 8 presuppose the existence of a valid appeal. Obviously Montgomery when he prepared and filed his motion for an order staying the injunction, believed that he had effectively appealed from the judgment and did not then intend his motion to serve as a notice of appeal, and we do not so construe it.

For the reasons given we conclude that this court lacks jurisdiction. The appeal is dismissed for want of jurisdiction.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

CENTURY LAMINATING, LTD., Plaintiff, *vs.* STEVEN H. MONTGOMERY, individually, and d/b/a LAMINATING COMPANY OF COLORADO, and d/b/a AMERICAN LAMINATING COMPANY, and AMERICAN LAMINATING COMPANY, a Colorado Corporation, Defendants.	No. 76-197-P Civil

JUDGMENT

THIS CAUSE coming on to be heard and the Plaintiff, Century Laminating, Ltd., appearing by its attorneys, Robinson, Stevens & Wainwright, and the Defendants, Steven H. Montgomery, and American Laminating Company, a Colorado corporation, appearing by their attorneys, Coors, Singer & Broullire, a jury of six persons was regularly empaneled to try said action, and witnesses on the part of the Plaintiff and Defendants were sworn and examined. After hearing the evidence, the arguments of counsel, and the instructions of the Court, the jury retired to consider their verdict and subsequently returned into the Court, and rendered their unanimous verdict as follows:

That the Plaintiff should have and recover from both of the Defendants the sum of $14,000.00 in compensatory damages, and the sum of $14,000.00 in punitive damages.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said Plaintiff, Century Laminating Ltd., have and recover of and from the said Defendants Steven H. Montgomery and American Laminating Company a Colorado corporation, the sum of $14,000.00 in compensatory damages, and the sum of $14,000.00 in punitive damages, together with interest and costs, and let execution issue therefor.

UNITED STATES DISTRICT JUDGE

APPENDIX C

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4.

APPEAL AS OF RIGHT—WHEN TAKEN

(a) Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the mean-

ing of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

APPENDIX D

28 U.S.C. §1291. **Final decisions of district courts**
The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Island, except where a direct review may be had in the Supreme Court.

APPENDIX

1978 TERM

No. 78-1933

STEVEN H. MONTGOMERY, Individually, and d/b/a
LAMINATING COMPANY OF COLORADO, and d/b/a
AMERICAN LAMINATING COMPANY,
Petitioner,

v.

CENTURY LAMINATING, LTD.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 28, 1979
CERTIORARI GRANTED OCTOBER 9, 1979

INDEX

INTRODUCTORY NOTE

The Judgment of the United States District Court for the District of New Mexico in Action No. 76-197-P is printed in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit at page B-1.

The opinion of the United States Court of Appeals for the Tenth Circuit in Action No. 77-1541 is printed in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit at page A-1.

The Petitioner and the Respondent have stipulated that the United States District Court Docket should be printed in abbreviated form reflecting docket entries dating from the first day of jury trial in Action No. 76-197-P.

UNITED STATES DISTRICT COURT DOCKET

CENTURY LAMINATING, LTD.,
Plaintiffs,

v.

STEVEN H. MONTGOMERY, and d/b/a
LAMINATING COMPANY OF COLORADO, and d/b/a
AMERICAN LAMINATING COMPANY,
Defendants.

REMOVAL from District Court of Bernalillo County.

Breach of Contract — Title 28 U.S.C. 1332 and 1441 — Breach of Contract in manufacture and distribution of specialty laminated products.

WILLIAM J. LOCK ROBINSON, STEVENS & WAINWRIGHT 904 Sandia Savings Bldg. Albuquerque, NM 87102 243-6777	HAROLD D. STRATTON, JR. ROBERT N. SINGER COORS, SINGER & BROULLIRE 200 Lomas N.W., Suite 1100 American Bank of Commerce Bldg. Albuquerque, NM 87125 243-3547 (P.O. Box 25684)

Court Reporter: Howard Henry, CA#77-1541

5- 2-77	JURY TRIAL: For Plaintiff: W. Lock and D. Lee. For Defendants: R. Singer and H. Stratton. Jury selected and sworn. Opening Statements. Evidence presented. PAYNE, Judge. (Bean) HENRY, Reptr.
5- 3-77	SECOND DAY OF TRIAL: Same counsel. Evidence presented. PAYNE, Judge. (Malone) HENRY, Reptr.
5- 4-77	THIRD DAY OF TRIAL: Same counsel. Evidence presented. PAYNE, Judge. (Malone) HENRY, Reptr.

5- 5-77 FOURTH DAY OF TRIAL: Same counsel. Evidence presented.
PAYNE, Judge. (Malone) HENRY, Reptr.

5- 6-77 FIFTH DAY OF TRIAL: Same counsel. Evidence presented. Final Arguments. Instructions. Jury begin deliberation. Jury excused until Monday, May 9, 1977.
PAYNE, Judge. (Malone) HENRY, Reptr.

5- 9-77 SIXTH DAY OF TRIAL: Jury continues deliberation and brings in Verdict in favor of Plaintiff. Court orders Verdict filed and Judgment to be presented to court by Plaintiff counsel within five days.
PAYNE, Judge. HENRY, Reptr.

VERDICT in favor of Plaintiff: $14,000.00 actual damages; $14,000.00 punitive damages.

EXHIBITS as per lists lodged in brown folder.

5- 9-77 DEPOSITION of John Richard Lewinger.

DEPOSITION of Victor Brown.

5-11-77 123 ORDER that defendants' counterclaim and each of three causes of action contained therein are dismissed with prejudice.
(PAYNE). Copies to counsel

124 JUDGMENT that Plaintiff, Century Laminating, Ltd., recover from Defendants, Steven H. Montgomery and American Laminating Co., the sum of $14,000.00 in compensatory damages and the sum of $14,000.00 in punitive damages, with interest and costs and let execution issue therefor.
(PAYNE). Copies to counsel

FINAL ENTRY

5-16-77 125 RETURN of service by U.S. Marshal on Victor Brown returned unexecuted on 5-2-77, at request of attorney.

126 RETURN of service by U.S. Marshal on Steven H. Montgomery unexecuted on 4-25-77.

5-17-77 127 BILL OF COSTS by Plaintiff, in the amount of $1,761.09.

5-19-77 128 MOTION for judgment notwithstanding the verdict by Defendants.

129 MOTION for injunction by Plaintiff.

130 MEMORANDUM Brief in support of motion for injunction by Plaintiff.

5-19-77 131 MOTION to enjoin Defendants by Plaintiff, with attachments.

132 MEMORANDUM Brief in support of motion to enjoin Defendants.

133 AFFIDAVIT of Ronald E. Smith.

134 AFFIDAVIT of William J. Lock.

135 AFFIDAVIT of Ronald E. Smith.

136 AFFIDAVIT of William J. Lock.

5-23-77 137 OBJECTIONS to Plaintiff's Bill of Costs.

6- 7-77 138 ORDER SETTLING COSTS. (CLERK—JC)
Copies to counsel.

6-10-77 139 NOTICE OF APPEAL by Defendant of Order dismissing entered on 5-11-77. $5.00 FF pd. $250.00 will be paid in one week.
Copies to counsel of Notice of Appeal. Copy of Notice of Appeal and complete docket entries mailed to Court of Appeals, Denver. Copy of complete docket entries, form letter no. 2, and designation form letter mailed to counsel for Defendant. Copy of Notice and complete docket entries delivered to Court Reporter. Copy of Notice of Appeal delivered to Judge Payne.

6-14-77 140 ORDER that Defendants' motion for judgment notwithstanding verdict is denied, each party respective costs in connection with motion.
(PAYNE). Copies to counsel.

141 ORDER that Plaintiff's motion to enjoin corporate Defendant, American Laminating Co., a Colorado Corp., is denied, each party to bear their costs in connection with motion.
(PAYNE). Copies to counsel.

6-17-77 142 COST BOND of $250 by Defendant.

6-20-77 LETTER from Mr. Harold D. Stratton, Jr., to Jesse Casaus, Clerk re: confirming arrangements with court reporter for transcript of record, with copy of letter addressed to Howard Henry.

6-23-77 143 DESIGNATION of record by Defendant counsel.

7- 8-77 144 MOTION by Defendants for Order of the Court setting trial on merits of Plaintiff's request for injunctive relief.

7-18-77 145 ORDER extending time until August 9, 1977 for filing and docketing appeal (additional time required by Reporter to prepare transcript of appeal).
(PAYNE). Copies to counsel.

7-18-77 LETTER from Court of Appeals assigning number 77-1541.

7-20-77 146 DESIGNATION of record by Plaintiff.

8- 5-77 147 ORDER extending time until August 29, 1977, for filing and docketing appeal. (PAYNE). Copies to counsel and U.S. Court of Appeals.

8- 8-77 148 ORDER that Defendants' motion for order of Court to set trial on merits is denied
(PAYNE). Copies to counsel.

8- 9-77 149 INJUNCTION that Defendants, Steven H. Montgomery, American Laminating Co., and all persons in active participation with Defendants are restrained from violating terms of agreement dated 5-21-71, and enjoined until further order of this Court from:
1) distributing products outside Denver, Colorado area.
2) divulging to another the process owned and used by Century Laminating, Ltd.
3) selling franchises or granting licenses to other persons, firms, etc.
4) using name of American Laminating Co., or similarity.
(PAYNE). Copies to counsel.

8-29-77 TRANSCRIPT of proceedings in five volumes (original and one) received from Court Reporter.
Record on Appeal in IX volumes mailed to the Court of Appeals by certified mail.

8-31-77 RECEIPT acknowledge of record on appeal by Court of Appeals in nine volumes.

9- 7-77 150 STAY of injunction pending appeal by Defendants.

9-19-77 151 MEMORANDUM by Defendants in support of Defendants' motion for stay of injunction pending appeal.

9-21-77 152 RETURN of service by U.S. Marshal on Steven H. Montgomery, unexecuted on 8-18-77.

153 ORDER that record on appeal is enlarged to include the following motions, pleadings and orders filed in cause subsequent to May 19, 1977; (1) order of Court of 6-14-77 denying Defendants' motion for judgment notwithstanding the Verdict; (2) Injunction of Court filed 8-9-77. (3) Order of the Court extending time for filing docketing appeal 7-18-77; (4) Order of Court extending time for filing and docketing appeal entered 8-5-77; (5) motion of Defendants for Stay of Injunction pending Appeal filed on 9-7-77; (6) any unfiled response of Plaintiff to motion of Defendants for stay of Injunction pending appeal; (7) any order of Court entered regarding motion of Defendants for stay of injunction pending appeal; that Clerk of District Court shall accumulate additional pleadings and transmit them for inclusion in record on appeal to U.S. Court of Appeal; this Order shall also be included in record on appeal to Tenth Circuit.
(PAYNE). Copies to counsel.

9-28-77 SUPPLEMENTAL Record on Appeal Volume II mailed to Court of Appeals.

RECEIPT acknowledged from Court of Appeals of supplemental record on appeal in one volume.

9-30-77 RECEIPT acknowledged from Court of Appeals of supplemental record on appeal in one volume.

10- 5-77 RECEIPT acknowledged from Court of Appeals of supplemental record on appeal III in one volume.

10-19-77 SUPPLEMENTAL Record on Appeal Volume IV mailed to the Court of Appeals.

10-22-77 RECEIPT acknowledged from Court of Appeals of Supplemental Record IV.

10-31-77 RECEIPT acknowledged from Court of Appeals of Supplemental V Record from Court of Appeals.

11- 9-77 154 OBJECTION by Plaintiff to Defendants' statement supplementing record.

155 STATEMENT by Defendants, Appellants, supplementing the record.

156 AFFIDAVIT of Robert N. Singer with attachments.

157 ORDER regarding motion of Defendants-Appellants to supplement the record on appeal.

158 ORDER that motion of Defendant for stay of injunction pending appeal is denied; that should Defendant post supersedas bond in amount of $15,400.00 (being actual damages recovered by Plaintiff, plus 10%) injunction shall be stayed pending appeal. (PAYNE). Copies to counsel.

11-11-77 RECORD on appeal supplemental Volume VI mailed to Court of Appeals.

12-20-77 159 RETURN OF SERVICE of Injunction by Marshal on Steven H. Montgomery returned unexecuted.

4-26-79 160 CERTIFIED COPY of Judgment and Opinion (Mandate) from U.S.C.A., dismissing appeal for want of jurisdiction. (PHILLIPS).

5-23-79 Volumes I through IX, Supplemental Volumes I through VI, etc. received from U.S.C.A.

6- 2-79 Contacted both Parties and William J. Lock recovered his exhibits, also Mr. Singer was notified but advised that William Graneley was counsel to the Defendant exhibits. Mr. Graneley left no forwarding address in Denver, CO. Exhibits will be destroyed by the Court on 6-26-79.

7-25-79 Letter from U.S.C.A. stating that a Petition for Writ of Certiorari was filed on June 28, 1979, and assigned Supreme Court No. 78-1933.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CENTURY LAMINATING, LTD.,
Plaintiff,
v.
STEVEN H. MONTGOMERY, individually and d/b/a LAMINATING COMPANY OF COLORADO, and d/b/a AMERICAN LAMINATING COMPANY and AMERICAN LAMINATING COMPANY, a Colorado corporation,
Defendants.

No. CIV-76-197 P

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Defendants, Steven H. Montgomery, Laminating Company of Colorado, American Laminating Company and American Laminating Company, a Colorado corporation, having at the close of all the evidence, moved the Court to direct a verdict in their favor which motion was denied and thereafter a verdict having been returned by the jury in favor of the Plaintiff, Century Laminating, Ltd., Defendants now move the Court to have the verdict and the judgment entered thereon set aside and to have judgment entered in accordance with their motion for a directed verdict. This motion is made on each and all of the grounds asserted in support of the Defendants motion for directed verdict and the following:

I

No evidence whatever was introduced at trial supporting the jury's verdict for punitive damages. Moreover, as a general rule, damages for breach of contract are limited to pecuniary loss sustained. Exemplary or punitive damages are not, ordinarily, or as a rule, recoverable in actions for breach of contract.

St. Paul at Chase Corp. v. Manufacturers Life Ins. Co., 262 Md. 192, 278 A.2d, cert. den., 404 U.S. 857, 30 L.Ed.2d 98, 92 S.Ct. 104. This rule applies, without exception, even if the breach is willful. *White v. Benkowski*, 37 Wis.2d 285, 155 N.W.2d 74.

The general rule in New Mexico is that punitive damages may not be awarded in a breach of contract action unless there is a showing of malice or of reckless or wanton disregard of the Plaintiffs' rights. *State Farm General Ins. Co. v. Clifton*, 86 N.M. 757, 527 P.2d 798 (1974). A more recent New Mexico case holds that punitive damages may not be awarded in a contract action unless the Defendants' conduct is maliciously intentional, fraudulent, oppressive or committed recklessly or with wanton disregard of the wronged party's rights. *Sierra Blanca Sales Co., Inc. v. Newco Industries, Inc.*, 88 N.M. 472, 542 P.2d 52 (1975).

There was no showing in this case that the Defendants' actions were either malicious, fraudulent, oppressive or committed recklessly or with wanton disregard of the Plaintiff's, Century Laminating, Ltd., rights. Therefore, punitive damages against the Defendants is wholly inappropriate.

Additionally, there is separate authority with relation to covenants not to compete, indicating that punitive damages are not recoverable in an action for breach thereof. 54 Am.Jur.2d, Monopolies, §579; *Howard v. Taylor*, 90 Ala. 241, 8 So. 36. The Plaintiff in this case was merely an assignee of the contract alleged to have been breached. Punitive damages for breach of a contract are not properly recoverable by an assignee. This is particularly true where, as here, no bad faith on the part of the Defendants has been shown beyond a mere breach of the agreement, where no notification of the assignment was given to the Defendants, and where the Plaintiff made no demand upon the Defendant to cease or cure the breach prior to the filing of this litigation. It would follow since punitive damages are not allowable in a breach of contract action, that the assignee of such a contract would not be entitled to recover punitive damages on an action thereon.

There being no evidence supporting punitive damages under any legal theory, the Defendants would respectfully move the Court to set aside that portion of the verdict awarding the Plaintiff punitive damages.

II

The evidence adduced at trial was wholly speculative, and in any event unrelated to the amount of compensatory damages awarded by the jury. No testimony or evidence was presented at trial to indicate that the Plaintiff had been damaged in any amount and certainly not in the amount of $14,000. The Defendants therefore, move the Court to set aside the portion of the verdict awarding compensatory damages as being against the clear weight of the evidence.

III

The Defendants would further resubmit all previous legal points raised before this Court presented in this case and in conjunction with their motion for directed verdict and incorporate them herein by reference. There being no evidence to support the jury's verdict, the Defendants would respectfully move the Court pursuant to Rule 50 of the Federal Rules of Civil Procedure for a Judgment Notwithstanding the Verdict, in favor of the Defendants, dismissing all claims of the Plaintiff herein.

COORS, SINGER & BROULLIRE
BY: _____
HAROLD D. STRATTON, JR.
Attorney for Defendants
200 Lomas, NW — Suite 1100
P.O. Box 25684
Albuquerque, NM 87125
Telephone: 243-3547

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CENTURY LAMINATING, LTD.,
Plaintiff,

v.

STEVEN H. MONTGOMERY, individually and d/b/a LAMINATING COMPANY OF COLORADO, and d/b/a AMERICAN LAMINATING COMPANY and AMERICAN LAMINATING COMPANY, a Colorado corporation,
Defendants.

FILED
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO
MAY 19, 1977

No. 76-197-P Civil

MOTION FOR INJUNCTION

COMES NOW the Plaintiff, Century Laminating, Ltd., a New Mexico corporation, by its attorneys, Robinson, Stevens & Wainwright, and respectfully moves the Court for a permanent injunction enjoining the Defendants from:

1. Distributing custom or specialty laminated products outside of the metropolitan area of Denver, Colorado, or contracting with others to distribute the same outside of that area.

2. From divulging to another the process owned and used by Century Laminating, Ltd., for the manufacture of custom or specialty laminated products.

3. From selling franchises or granting licenses to other persons, firms or organizations for the purpose of manufacturing or distributing such custom or specialty laminated products.

4. From using the name, American Laminating Company, or any other name similar thereto.

In support thereof, Plaintiff respectfully states that the above referred to four elements of a contract dated May 21, 1971 were considered in a jury trial commencing May 2, 1977, in

which a verdict was rendered for damages in favor of the Plaintiff and against the Defendants, and the jury having found that the contract was valid and reasonable and should be enforced.

WHEREFORE, Plaintiff prays that the Court enter a permanent injunction enjoining the Defendants, their employees, servants, and agents from further violations of the terms of the agreement of May 21, 1971, which was attached as Exhibit "1" to the Plaintiff's Second Amended Complaint.

ROBINSON, STEVENS & WAINWRIGHT

By _____
WILLIAM J. LOCK
Attorneys for Plaintiff
P.O. Box 787
Albuquerque, New Mexico 87103
243-6777

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CENTURY LAMINATING, LTD., *Plaintiff,* v. STEVEN H. MONTGOMERY, individually and d/b/a LAMINATING COMPANY OF COLORADO, and d/b/a AMERICAN LAMINATING COMPANY and AMERICAN LAMINATING COMPANY, a Colorado corporation, *Defendants.*	FILED UNITED STATES DISTRICT COURT ALBUQUERQUE, NEW MEXICO JUN 10, 1977 No. 76-197-P Civil

NOTICE OF APPEAL

NOTICE is hereby given that Steven H. Montgomery, Defendant above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the final judgment entered on the 11th day of May, 1977.

COORS, SINGER & BROULLIRE

BY: _____
ROBERT N. SINGER
Attorney for Defendant
200 Lomas, NW — Suite 1100
P.O. Box 25684
Albuquerque, NM 87125
Telephone: 243-3547

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CENTURY LAMINATING, LTD., *Plaintiff,* v. STEVEN H. MONTGOMERY, individually and d/b/a LAMINATING COMPANY OF COLORADO, and d/b/a AMERICAN LAMINATING COMPANY and AMERICAN LAMINATING COMPANY, INC. *Defendants.*	FILED UNITED STATES DISTRICT COURT ALBUQUERQUE, NEW MEXICO JUN 14, 1977 No. 76-197 Civil

ORDER

THIS MATTER comes on for consideration upon the motion of the Defendants, Steven H. Montgomery, Laminating Company of Colorado, American Laminating Company and American Laminating Company, a Colorado corporation, for judgment notwithstanding the verdict, filed May 19, 1977, and the Court having reviewed the file, exhibits and memorandum therein and being fully advised in the premises concludes that the motion is not well taken and should not be granted.

NOW, THEREFORE,

IT IS BY THE COURT ORDERED that the Defendants' motion for judgment notwithstanding the verdict be, and it is hereby denied, each party to bear their respective costs in connection with this motion.

/s/ H. Vearle Payne

_____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CENTURY LAMINATING, LTD.,
Plaintiff,

v.

STEVEN H. MONTGOMERY, individually and d/b/a LAMINATING COMPANY OF COLORADO, and d/b/a AMERICAN LAMINATING COMPANY and AMERICAN LAMINATING COMPANY, a Colorado corporation,
Defendants.

FILED
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO
AUG 9, 1977

No. 76-197-P Civil

INJUNCTION

THIS CAUSE coming on before the Court on the Motion of the Plaintiff, Century Laminating, Ltd., filed May 19, 1977, for a permanent injunction against the Defendants, and the Court having examined the Affidavits and Memorandum Brief filed in support of said Motion, and the Court having reviewed the jury verdict and Judgment entered following the trial hereof and the Court being fully advised and informed in the premises,

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Defendants, Steven H. Montgomery, American Laminating Company, a Colorado corporation, and any and all officers, agents, servants, employees, attorneys, and all those persons in active concert or participation with the said Defendants, be and they hereby are perpetually enjoined and restrained from violating the terms of the agreement dated May 21, 1971, and specifically they are enjoined until further Order of this Court from the following acts:

1. Distributing custom or specialty laminated products outside of the metropolitan area of Denver, Colorado, or contracting with others to distribute the same outside of that area.

2. From divuling to another the process owned and used by Century Laminating, Ltd., for the manufacture of custom or specialty laminated products.

3. From selling franchises or granting licenses to other persons, firms or organizations for the purpose of manufacturing or distributing such customs or specialty laminated products.

4. From using the name, American Laminating Company, or any other name similar thereto.

/s/ H. Vearle Payne

UNITED STATES DISTRICT JUDGE

APPROVED:
/s/ William J. Lock

Attorney for Plaintiff

Attorney for Defendants

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CENTURY LAMINATING, LTD.,
Plaintiff-Appellee,

v.

STEVEN H. MONTGOMERY, individually, and d/b/a LAMINATING COMPANY OF COLORADO, and d/b/a AMERICAN LAMINATING COMPANY, a Colorado corporation,
Defendants-Appellants.

No. 77-1541

JOHN R. FRYE, JR.
FRYE AND SAWAYA
50 South Steele Street
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Denver, Colorado 80209
(303) 388-0904
Attorneys for Appellant

WILLIAM J. LOCK
Albuquerque, New Mexico 87102
507 Roma, N.W.
(505) 843-6031
Atorney for Appellee

No. 76-197-P

PAYNE, Judge.
HENRY, Court Reporter.

Notice of appeal filed: June 10, 1977
Action commenced: March 30, 1976

7-14-77	Cause docketed; docketing statement, orig. and 9 cc.
7-20-77	Appearance — Appellants — Singer
7-25-77	Appearance — Appellee — Lock
7-26-77	Appearance — Appellants — Vernon, Sartore and Hoyt.
8- 8-77	Copy of Dist. Ct. order granting extension of time to file record to 8-9-77.
	Copy of Dist. Ct. order granting extension of time to file record to 8-29-77.
8-31-77	Record on appeal; Vol. 1 (pleadings) (356 pp.); Vol. II (deposition); Vol. III, IV (exhibits); Vol. V, VI, VII, VIII, IX (transcript) (807 pp.), orig. (1163++ pp.).
9- 7-77	Order — assigned to Calendar B; appellant's brief due 9-28-77 — Lewis.
9-15-77	Appellant's mot for ext to 10-28-77 to file brief — O & 3cc, c/s.
	Order: Appellant GRANTED to 10-28-77 to file brief — RLh — cnsl ntfd.
9-26-77	Record on appeal; Supp. Vol. I (pleadings) (28 pp.); orig.
9-30-77	Record on appeal, Supp. Vol. II (pleadings) (15 pp.), orig.
10- 5-77	Record on appeal, Supp. Vol. III (pleadings) (43 pp.), orig.
10-22-77	Record on appeal, Supp. Vol. IV (pleadings) (15 pp.), orig.

10-25-77 Appellant's motion for ext to 11-14-77 to file brief — O & 3 cc, c/s.

Order: Appellant GRANTED to 11-14-77 to file brief — RLH — cnsl ntfd.

10-31-77 Record on appeal, Supp. Vol. V (pleadings) (17 pp.), orig.

11-11-77 Appellant's motion for ext to 11-28-77 to file brief — O & 3 cc, c/s.

Order: Appellant GRANTED to 11-28-77 to file brief — RLH — cnsl notfd.

11-16-77 Record on appeal, Supp. Vol. VI (pleadings) (23 pp.), orig.

11-28-77 Record on appeal, exhibits (cardboard box containing plaques and spray bottles, paint can.

11-28-77 Appellant's (Montgomery) brief — O & 9 cc, c/s.
Record on appeal — Vols. I, V, VI, VII, VIII, IX, Supp. Vols. I, II, III, IV, V, VI, 3 cc.

12- 8-77 Appellee's motion for ext to 1-6-78 to file brief — O & 3 cc, c/s.

12- 9-77 Order: Appellee GRANTED to 1-6-77 to file brief — HKP — cnsl ntfd.

1- 6-78 Appellee's motion for ext to 1-13-78 to file brief — O & 3 cc, c/s.

Order: Appellee GRANTED to 1-13-78 to file brief — RLH — cnsl notfd.

1-16-78 Appellee's brief — Orig. only, c/s. (9 cc received 1-17-78).

1-27-78 Case submitted to panel for possible summary dismissal and further briefing on issue of appellate jurisdiction.

1-31-78 Appellant's (Montgomery) reply brief — O & 9 cc, c/s.

2-14-78 Letter to parties directing filing of supplemental memoranda on or before 3-1-78 — HKP.

3- 1-78 Appellant's (Montgomery) supplemental brief, O & 9 cc, c/s ss.

3- 6-78 Appellee's motion to dismiss, O & 9 cc, c/s (to panel 3-17-78).

Appellee's memorandum brief, O & 9 cc, c/s ss.

3-14-78 Appellant's response in opposition to appellee's motion to dismiss. O & 3 cc, c/s (to panel 3-17-78).

3-20-78 Appellees' (Kirshbaum, Peel & Strange). O & 9 cc, c/s.

3-17-78 Motion to dismiss and response to panel.

3-29-78 Order — motion to dismiss denied, with leave to renew the motion time of oral argument, jurisdictional question to be considered with other issues raised on appeal — Lewis, McWilliams.

9-28-78 Appearance — appellant — John R. Frye, Jr.

10-20-78 Set for hearing — November, 1978, Term — Denver, Colorado.

11- 1-78 Appellants' motion requesting leave to submit issue on briefs and be excused from oral argument — O & 2 cc — c/s (to panel).

11- 9-78 M.PTP.ARG.F Appellee's letter motion to participate in oral argument filed — 1 copy.

M.PTP.ARG.F.SUBM. Appellee's letter motion to participate in oral argument submited to panel per phone information 11-6-78.

11-16-78 M.SUBM.CS.BR.DISP. Order granting appellant's motion to submit on briefs disposed of by Seth.

11-17-78 CS.ARG.SUBM — Case argued and submitted to Seth, Breitenstein, Stanley.

4- 2-79 OPN.F — published signed opinion filed by Seth, Breitenstein, Stanley. Writing judge is Stanley.

JM.DISP — appeal dismissed for want of jurisdiction by published signed opinion — Seth, Breitenstein, Stanley.

4-24-79 MDT.ISS — mandate issued to district court.

4-27-79 ROA.RMK — Letter re record to Judge Stanley.

4-28-79 MDT.RCPT.F — mandate receipt filed.

5-21-79 ROA,RTN.DC. Record on appeal returned to the District Court (Vol. I through IX, Supp. Vol. I through VI and exhibits cardboard box containing plaques and spray bottles and paint can).

6-18-79 ROA.RMK — duplicate record receipt sent District Court.

6-25-79 ROA.RCPT.F — duplicate record receipt filed.
ROA.RCPT.F — record receipt filed.

7-23-79 P.WRIT.CERT.F — appellant's petition for writ of certiorari filed assigned Supreme Court No. 78-1933.

10-11-79 P.WRIT.CERT.DISP — appellant's petition for writ of certiorari by Supreme Court order on 10-9-79.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CENTURY LAMINATING, LTD.,
Plaintiff-Appellee,

v.

STEVEN H. MONTGOMERY, individually, and d/b/a LAMINATING COMPANY OF COLORADO, and d/b/a AMERICAN LAMINATING COMPANY, a Colorado corporation,
Defendants-Appellants.

FILED
UNITED STATES
COURT OF APPEALS
TENTH CIRCUIT
MAR 6, 1978

No. 77-1541

MOTION

COMES NOW the Plaintiff-Appellee, by its attorneys, Robinson, Stevens and Wainwright, and respectfully moves the Court to Dismiss the Appeal of Steven H. Montgomery, for failure to file a Notice of Appeal therefrom, or in the alternative to Dismiss that portion of the Appeal of the Defendant, Steven H. Montgomery, relating to the Injunction entered on August 9, 1977, since no Notice of Appeal was filed from the entry of that Injunction.

Respectfully submitted,
ROBINSON, STEVENS & WAINWRIGHT

By: _____
WILLIAM J. LOCK
Attorney for Plaintiff-Appellee
P.O. Box 787
Albuquerque, New Mexico 87103
243-6777

(Certificate of service omitted in printing)

In the

Supreme Court of the United States

1978 Term

No. 78-1933

STEVEN H. MONTGOMERY, Individually, and d/b/a
LAMINATING COMPANY OF COLORADO,
and d/b/a
AMERICAN LAMINATING COMPANY,
PETITIONER,
v.
CENTURY LAMINATING, LTD.,
RESPONDENT.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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LIST OF AUTHORITIES CITED

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LAMINATING COMPANY OF COLORADO,
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PETITIONER,
v.
CENTURY LAMINATING, LTD.,
RESPONDENT.

RESPONSE
TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

CENTURY LAMINATING, LTD., the Respondent herein, prays that the Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be denied, and that the judgment of the United States Court of Appeals for the Tenth Circuit entered on April 2, 1979, be affirmed and ratified in all respects.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 595 F.2d 563 and is printed in Appendix A of the Petitioner's Petition for Writ of Certiorari.

JURISDICTION

The Petitioner's statement of jurisdiction is sufficient.

QUESTIONS PRESENTED

The Respondent respectfully suggests that there are two questions presented rather than the single question as noted by the Petitioner, and the Respondent would also suggest that the question as identified by the Petitioner be more precisely worded. The Respondent would show these two questions as follows:

1. Where a notice of appeal is filed during the pendency of a Rule 50 motion, and is therefore filed prior to the entry of a final judgment, may an appellate court accept the notice of appeal as if it were filed for review of a final judgment pursuant to 28 U.S.C. §1291, or does the premature filing of the notice of appeal deprive the appellate court of jurisdiction?

2. Where a notice of appeal is filed during the pendency of a Rule 50 motion and also during the pendency of a motion for injunction, which injunction was entered 60 days after the notice of appeal was filed, and from which injunction no notice of appeal was filed, may an appellate court accept the notice of appeal as if it were filed for review of the final judgment and injunction pursuant to 28 U.S.C. §1291, or does the failure to file the notice of appeal from the injunction deprive the appellate court of jurisdiction?

STATUTES AND FEDERAL RULES INVOLVED

The Petitioner's statement thereof is sufficient.

SUPPLEMENTARY STATEMENT OF THE CASE

The Petitioner's statement of the case is correct, although not concise, but the Respondent would respectfully offer the following outline in sequence of essential facts for the easier understanding of the issues. This sequence of the material facts is as follows:

1. Judgment was entered on the jury verdict against the Petitioner on May 11, 1977.

2. The Petitioner's Rule 50 (b) Motion for Judgment Notwithstanding the Verdict (hereinafter Motion for Judgment n.o.v.) was filed on May 19, 1977.

3. The Respondent's Motion for Injunction was filed on May 19, 1977.

4. The Petitioner's Notice of Appeal was filed on June 10, 1977 (the other Defendant, American Laminating Company, a Colorado corporation, did not appeal).

5. The United States District Court for the District of New Mexico denied the Petitioner's Rule 50 (b) Motion on June 14, 1977.

6. The District Court for the District of New Mexico entered the Injunction on August 9, 1977.

7. The Petitioner filed a Motion for Stay of the Injunction on September 7, 1977.

8. The District Court for the District of New Mexico denied the Motion for Stay of Injunction on November 9, 1977.

9. No notices of appeal were filed from the denial of the Motion for Judgment n.o.v., from the Injunction, or from the denial of the Motion for Stay of the Injunction.

ARGUMENTS AND AUTHORITIES AGAINST GRANTING THE WRIT

The Respondent submits the following arguments and authorities against granting the writ as requested by the Petitioner.

POINT I

APPEALS LIE ONLY FROM FINAL DECISIONS

The language of 28 U.S.C. §1291 clearly provides that "Courts of Appeals shall have jurisdiction of appeals from all final decisions. . . ." Strong policy reasoning supports the definition of "final decisions," and this Court has recently stated that "federal appellate jurisdiction generally depends on the existence of a decision by the district court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment' [citations omitted]" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978). This Court also has pointed out the policy behind requiring a final decision prior to appeal in the case of *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976), wherein an appeal was dismissed and remanded to the district court when an appeal was taken from an interlocutory order.

As is clearly stated in Rule 4, Federal Rules of Appellate Procedure, the running of the time for filing a notice of appeal is terminated by the timely filing of certain motions. "When such post-trial motion is made, any judgment heretofore entered ceases to be final until the motion is ruled upon." *Wiggs v. Courshon*, 485 F.2d 1281 (5th Cir. 1973). The reason for this is that where the court has power to further review its judgment, the judgment is not final as long as it is being considered by the court. This Court said in *Leishman v. Associated Electric Co.*, 318 U.S. 203 (1943), that when such motions are addressed to questions of substance and not mere matters of form and therefore that the effect of the motion was to ask that rights

already adjudicated be altered, such a motion deprived the judgment of that finality which is essential to appealability. In addition, this Court has specifically equated such prematurity by virtue of pending motions as a nullity, and dismissed the premature appeal. *U.S. v. Crescent Amusement Co.*, 323 U.S. 173, 177 (1944).

Therefore, except for judicial and statutory exceptions which have been created, appeals lie only from final judgments, and a judgment is not final during the pendency of certain motions, such as a Rule 50 motion, and only becomes final when a decision has been rendered on such a motion.

POINT II

THE PREMATURE NOTICE OF APPEAL DEPRIVES THE APPELLATE COURT OF JURISDICTION

As was discussed in Point I hereinabove, normally a premature appeal (from a non-final judgment) is a nullity, and is, therefore, dismissed. This is the technical requirement of the cases as well as of Rule 4 of the Federal Rules of Appellate Procedure. Ignoring for purposes of discussion in this Point II the Injunction which was entered two months after the Notice of Appeal (from which there was no appeal), at the time the Notice of Appeal was filed, the Judgment based upon the jury verdict was not final. Therefore, the appeal was premature because of the pendency of the Rule 50 Motion filed by the Petitioner. With the subsequent denial of the Rule 50 (b) Motion by the district court four days after the filing of the Notice of Appeal, the Judgment became final and therefore appealable, under the provisions of Rule 4. From this denial, there was no appeal. There is no dispute on this, as the Petitioner notes at Page 5 of his Petition for Writ of Certiorari that "he does not contest the fact that judgment entered on the jury verdict on May 11, 1977, was *not a final judgment*. . ." [emphasis added].

The Court of Appeals for the Tenth Circuit carefully considered the facts, the issues and the policy considerations when it rendered its decision in this matter. *Century Laminating, Ltd. v. Montgomery*, 595 F.2d 563 (10th Cir. 1979). The Tenth Circuit distinguished the case at bar from the case of *Morris v. Uhl & Lopez Engineers, Inc.*, 442 F.2d 1247 (10th Cir. 1971), which lacked finality only because of a failure to comply with the formalities of Rule 54 (b). The court below pointed out the very important policy difference that at the time the Notice of Appeal was filed, "his Motion for Judgment n.o.v. was pending - - the disposition of which clearly could have changed the form and content of the judgment." *Century* at 566. This

factor, that the trial court could have materially changed the judgment as originally entered, is a significant factor which needs to be compared with the other cases concerning the allowance or dismissal of appeals under premature notices of appeal.

The well reasoned opinion of the Tenth Circuit in this matter represents strong authority for denial of Petitioner's Writ. The Tenth Circuit correctly pointed out the division in the circuits on this issue and took a well-balanced approach between the sometimes conflicting technical requirements of the rules and other policy considerations. For example, the court clearly pointed out that "[a]lthough the premature notice of appeal did not transfer jurisdiction to this court, Montgomery did not lose his right to appeal. Within 30 days after entry of the order denying the motion for judgment n.o.v., he could have filed a new notice of appeal. . . ." *Century* at 568.

The Tenth Circuit premised its decision upon the rule that the finality requirement for appeal must have been satisfied at the time of filing of the notice of appeal. Here, however, the filing of the Rule 50 Motion prevented such finality, which is conceded by the Petitioner. The court below quoted two important decisions of this Court in upholding the reasons for continuing the finality doctrine, including preventing the thrusting of appellate courts into the trial process and preventing a full and complete review by an appellate court at a premature stage. *Century* at 567. In balancing these factors against other policy considerations, the Tenth Circuit's opinion referred to other circuits at variance with its opinion, and even quoted most fairly the most recent opposing case of *Yaretsky v. Blum*, 592 F.2d 65 (2nd Cir. 1979) and then stated:

> We cannot agree that this is the better rule. Litigants -- appellees as well as appellants -- have a right to rely upon conformity by their adversaries with applicable statutes and rules, especially when compliance with the rule is a jurisdictional prerequisite to the appeal itself. Expense,

> inconvenience, and what a litigant may believe to be injustice, are unavoidable consequences of failure to abide by a statute or rule, e.g., a statute of limitation. There is some virtue in finality -- in an end to litigation. When a notice of appeal is prematurely filed, the case is not in limbo. The trial court retains jurisdiction and a timely appeal may be taken from the final judgment when entered. *Century* at 568.

Thus, the court below concluded that the appeal should be dismissed for lack of jurisdiction.

Another well-reasoned opinion, exactly on point, is the decision of *Stevens v. Turner*, 222 F.2d 352 (7th Cir. 1955), in which the appeal was dismissed, with the same end result as the decision of the Tenth Circuit in this case. In *Stevens*, the appellant had filed his notice of appeal during the pendency of a motion to amend judgment, which is one of the Rule 59 motions mentioned in Rule 4 of the Federal Rules of Appellate Procedure. As was true below, after the entry of the notice of appeal, the appellant's motion was denied. The *Stevens'* court correctly considered whether the motion was merely directed to matters of form or to matters of substance. It is this factual distinction and consideration which was mentioned earlier which dictates that premature appeals such as the one here should not be allowed. Since the appellant's motion was intended to affect substantive rights, the original judgment could not be final. *Stevens* quoted this Court in the case of *Zimmern v. United States*, 298 U.S. 167 (1936), in reminding us that under such circumstances the trial court had plenary power to modify the judgment or even revoke it completely, either of which would render the original judgment non-final. The court dismissed the appeal, stating that since the appellant's appeal was "taken while his motion to amend the judgment was pending, [it] was premature. We acquired no jurisdiction by virtue of it and no after-occurring action or event can inject vitality into it." *Stevens* at 345.

In addition to the Seventh and Tenth Circuits' decisions, the recent case of *Keith v. Newcourt, Inc.*, 530 F.2d 826 (8th Cir. 1976) also reached the same result. That court stated that "it is clear that until the motion for new trial is ruled upon, a judgment is not final and any appeal therefrom is subject to dismissal as premature." *Keith* at 826. Again, it is the factual difference in this type of motion which is important to the consideration of this appeal. That is, that during the pendency of such a motion there is the possibility that the need for appeal will change, and the Eighth Circuit's opinion points out in it footnote that "since a new trial was granted, there exists no certainty that plaintiff will recover on the second trial, rendering the defendant's need for contribution speculative." *Keith* at 826 n.1. It is the policy of the finality doctrine to preclude such speculation, and therefore, the court below correctly dismissed the appeal because at the time the notice of appeal was filed the trial court could have granted the Petitioner's Motion for Judgment n.o.v., rendering the appeal unnecessary.

The Second Circuit has an internal conflict between the case of *Yaretsky v. Blum, supra,* 592 F.2d 65, cited by the Petitioner, and the case of *Napier v. Delaware, Lackawanna and Western Railroad Company*, 223 F.2d 28 (2nd Cir. 1955). *Napier* also involved the filing of motions, there to set aside the verdict and for a new trial. Before the decision thereon, the notice of appeal was filed. The court held that the first notice of appeal was premature and nugatory. The court went on to state that:

> If it seems harsh that the appellant for lack of a timely action is foreclosed from an appeal on the merits of the judgment against it, it must not be forgotten that successful appellees will suffer hardship if belated appeals are allowed to obstruct rights adjudicated by the trial court. However that may be, it is plain that we have jurisdiction to entertain only timely appeals. *Napier* at 31.

Thus, since the finality of a judgment is terminated by a timely motion, there can be no appeal under 28 U.S.C. §1291.

There are two major cases in the Third Circuit which appear to be somewhat contrary with the rule being advocated by the Respondent herein, both of which were cited by Petitioner. However, the case of *Hodge v. Hodge*, 507 F.2d 87 (3rd Cir. 1975) may be distinguished by virtue of the fact that no motion was pending such as is present in the case at bar, and the notice of appeal there was filed following an oral judgment which was formally entered immediately following the filing of the notice of appeal. The case of *Richerson v. Jones*, 551 F.2d 918 (3rd Cir. 1977), also may be distinguished on the same ground that there was no motion filed which could have changed the decision. In addition, in *Richerson* there were multiple appeals and the court clearly had jurisdiction over Richerson's appeal, and therefore, they also considered the government's appeal, although technically premature. Neither of these cases cites the earlier Third Circuit opinion in *Healy v. Pennsylvania R. Co.*, 181 F.2d 934, 936 (3rd Cir. 1950), which stated:

> We are not oblivious of the trend away from those niceties which so often in the past harassed both litigants and the courts. But we are not here insisting upon mere satisfaction of barren formal technicalities. Howsoever liberal we may wish to be, it cannot be gainsaid that certain formalities are indispensable to "just, speedy, and inexpensive" litigation, and these attributes of our federal judicial system are forthcoming only upon adherence to, rather than upon rejection of, the Rules. It is of the highest importance that the appellate function be free of, and protected from, the needless jurisdictional doubts so simply avoidable by compliance with a few specific instructions. The alternative can but induce a laxity destined to obscure the lines of proper appellate conduct, with consequent expense and hardship to the litigants, whose duty it is in the first instance to see to it that the record is in proper form for the relief sought.

The Fifth Circuit case of *Markham v. Holt*, 369 F.2d 940 (5th Cir. 1966), was cited by the Petitioner herein. Again, this case may be distinguished by the fact that there were no motions pending but that the notice of appeal was filed after an oral decision and immediately prior to the entry of the written judgment. It is interesting that the court pointed out that:

> [i]n reaching the conclusion that the defect in the instant appeal is not sufficiently substantial to deprive us of jurisdiction, we would be amiss in failing to urge strongly that in future cases involving premature action of this character another appeal should be perfected after entry of the formal judgment within the time allowed by law. *Markham* at 943.

Unfortunately, the urging of Judge Thornberry was not followed in the subsequent case of *Stokes v. Peyton's Inc.*, 508 F.2d 1287 (5th Cir. 1975). It is difficult to distinguish this case from the case at bar, but it is not difficult to see the danger in this type of decision. In *Stokes*, the notice of appeal was filed over a month before the decision became final. If such practices are allowed, perhaps the most prudent advice that should be given to the practicing lawyer in federal courts is that he should file his notice of appeal at the same time he enters his appearance, so that he does not later forget to do so. *Stokes*, in effect, over-rules the earlier Fifth Circuit case of *Turner v. HMH Publishing Co*, 328 F.2d 136 (5th Cir. 1964), which dismissed an appeal as premature. However, *Turner* gives us a perfect example of why it is important not to allow such premature appeals. There, the appellants had filed a motion to amend the judgment on the same day they filed a notice of appeal. Subsequently, the trial court actually entered an order amending the order, from which no notice of appeal was filed. Under those circumstances, how can an appellant give the requisite notice and contents in his notice of appeal of the order being appealed, pursuant to Rule 3 (c) of the Federal Rules of Appellate procedure? If any policy considerations are given to the finality doctrine and the waste of an appellate court's time,

adherence to the rules should be required.

The Ninth Circuit case of *Eason v. Dickson*, 390 F.2d 585 (9th Cir. 1968) has been frequently cited in favor of allowing premature appeals but can easily be distinguished. In addition to the fact that it is a criminal case, with entirely different rules and policy considerations, the appellant appeared *pro se* and the case did not involve the pendency of a motion as is present in the case at bar. The more recent case of *Song Jook Suh v. Rosenberg*, 437 F.2d 1098 (9th Cir. 1971), is more difficult to distinguish. However, the dangers that were disussed above are still amply present with the result which was rendered in this Ninth Circuit case.

The decision of this Court in *Lemke v. United States*, 346 U.S. 325 (1953), was a decision allowing a premature appeal. The policy considerations were vastly different since it involved a criminal proceeding and a jail sentence, especially considering the criminal rule cited therein and the fact that the government, as opposed to a private party, was the appellee. In addition, this case can be distinguished from the case at bar by virtue of the fact that there was no pending motion and that it was merely a notice of appeal filed three days prior to the formal entry of a written judgment.

The more recent decision by this Court in *Foman v. Davis*, 371 U.S. 178 (1962), is quite supportive of the Respondent's position. There, Rule 59 motions were pending at the time the notice of appeal was filed. Following the denial of the motions, a second notice of appeal was filed. Justice Goldberg allowed the appeal because of the fact that the appellant had filed the second notice of appeal. However, the Court accepted the Court of Appeal's treatment to dismiss the first appeal because a Rule 59 motion was pending. The Court allowed the appeal because of the second notice of appeal from the denial of the appellant's Rule 59 motions. This Court correctly construed the finality doctrine in the context of Rule 3 of the Federal Rules of Appellate Procedure, since at the time of entry of the

order denying the motions, the entire case, including the original dismissal, became final, and subject to appeal. Therefore, this Court has approved of the dismissal of an appeal as premature when the notice of appeal was filed during the pendency of a Rule 59 motion.

Based upon all of these factors, it is respectfully submitted that the Petitioner's Writ be denied and that this Court should adopt the principles stated by the Tenth Circuit Court of Appeals below. Here there was no jurisdiction because of the premature Notice of Appeal. The filing requirements for notices of appeal are not overly technical, such that the requirement to do so constitutes an impediment to one's rights. Neither is it overly technical to require such notices of appeal to be from final judgments to insure that the policy behind the finality doctrine is realized. The Tenth Circuit would have allowed a second notice of appeal to be filed in spite of the earlier premature notice of appeal. Where the litigant attempts to affect a substantial change in the judgment as originally entered, and skillfully uses the various Rules of Civil Procedure as enumerated in Rule 4 of the Federal Rules of Appellate Procedure, those motions should not be treated as extensions of time to file notices of appeal. If the litigant is expecting the court to give consideration to his motions, the litigant should just as carefully consider the filing of his notice of appeal and insure that it is from a final decision. Therefore, the result rendered below by the Tenth Circuit, as well as by other circuits holding the same result, should be affirmed by this Court as being in full accord with reasonable procedural rules and sound policy factors.

POINT III

PETITIONER'S APPEAL SHOULD BE DISMISSED BECAUSE THERE WAS NO APPEAL FROM THE INJUNCTION

Assuming for the purpose of discussion under this Point that the Petitioner's Notice of Apeal filed prior to the entry of the Order Denying the Judgment n.o.v. was adequate under the finality doctrine to grant appellate jurisdiction, there remains the question of the Injunction. Eight days after the entry of the original Judgment from the jury verdict, and on the same day the Petitioner filed his Motion for Judgment n.o.v., the Respondent Century filed its Motion for Injunction. Point II has dealt with the question of the appeal from the Judgment. Assuming for the purpose of this argument that a notice of appeal can relate back to the denial of a motion for judgment n.o.v., which is respectfully opposed in Point II hereinabove, can it be that the same notice of appeal also gives the required notice that the appellant is appealing from an injunction granted two months later? It is respectfully submitted under this Point III that the decision did not become final until the Injunction had been acted upon, which was entered on August 9, 1977. Since there was no notice of appeal from the entry of that Injunction, and since the original Notice of Appeal did not mention the Injunction, there was no appeal from a final decision in this cause, and therefore, the appeal should be dismissed.

Point I hereinabove discussed the finality doctrine and the various requirements for taking an appeal. The case of *Liberty Mutual Insurance Co. v. Wetzel, supra,* 424 U.S. 737, discussed exactly this issue. The plaintiff had sought injunctive relief and damages, and the appeal that was dismissed was an appeal by the defendent from the granting of a motion for summary judgment in plaintiff's favor. This Court discussed various ways that jurisdiction might be established and determined that none of them were applicable. Justice Rehnquist set forth the

policies of the finality doctrine, including the danger of multiple appeals. The decision stands for the proposition that the appeal should await the final determination of the case. Similarly, in the case at bar, the approach that the Petitioner has taken would involve two appeals, assuming that he had done so properly. In fact, even assuming that his first appeal was proper from the Judgment, there is no appeal whatsoever from the Injunction. In the Tenth Circuit, the Petitioner suggested that his Motion to Stay the Injunction, pursuant to Rule 62 (c) of the Federal Rules of Civil Procedure, should act as a Notice of Appeal. This suggestion was strongly and logically rejected by the Tenth Circuit Court. The very wording of Rule 62 (c) seems to show the unsoundness of the Petitioner's position: "[*w*]*hen an appeal is taken* from an interlocutory or final judgment granting, dissolving, or denying an injunction,. . ."[emphasis added]. There was no appeal from the Injunction and therefore, the trial court correctly denied the Motion for Stay of Injunction.

The issue came up in the reverse manner in the case of *Chappell & Co. v. Palermo Cafe Co.*, 249 F.2d 77 (1st Cir. 1957), where the appellate court dismissed the appeal for lack of jurisdiction because there had not been a decision on damages even though an injunction had been entered. The lack of finality under those circumstances required the dismissal of the appeal. Similarly, under the circumstances here, this entire cause should be dismissed because of the lack of finality. It seems to be total and unwarranted distortion to suggest that the Notice of Appeal filed on June 10, 1977, applies to an Injunction granted 60 days later and which is not described in that Notice of Appeal. Respondent Century had pled in its Complaint for both damages and injunctive relief. Therefore, it is submitted under this Point that there was no finality for the purposes of 28 U.S.C. §1291 at the time the Order was entered denying the Motion for Judgment n.o.v. and that the case did not become final for appeal purposes until the Injunction was entered some two months later. Since there was no appeal from the

Injunction, and since the Notice of Appeal did not include by its contents any reference to the Injunction, the appeal should be dismissed for lack of jurisdiction. Here, this should be done by denying the Petitioner's Writ.

CONCLUSION

Based upon the above and foregoing arguments and authorities, it is respectfully submitted that the Petitioner's Petition for Writ of Certiorari be denied and this cause be remanded to the United States District Court for the District of New Mexico for enforcement of the Judgment based upon the jury verdict and the Injunction.

Respectfully submitted,

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In the

Supreme Court of the United States

1978 TERM

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STEVEN H. MONTGOMERY, Individually and d/b/a LAMINATING COMPANY OF COLORADO, and d/b/a AMERICAN LAMINATING COMPANY,

Petitioner,

v.

CENTURY LAMINATING, LTD.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PETITIONER

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LIST OF AUTHORITIES CITED

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Steven H. Montgomery, Individually and d/b/a Laminating Company of Colorado, and d/b/a American Laminating Company,

Petitioner,

v.

Century Laminating, Ltd.,

Respondent.

BRIEF OF PETITIONER

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Steven H. Montgomery, individually and d/b/a Laminating Company of Colorado, and d/b/a American Laminating Company, the petitioner herein, prays that the Order of the Court of Appeals for the Tenth Circuit dismissing Appeal No. 77-1541 be reversed and the matter be remanded to said court for consideration on the merits of the petitioner's appeal from the United States District Court for the District of New Mexico in Action No. 76-197-P.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 595 F.2d 563 and is printed in Appendix A to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1). The judgment of the Court of Appeals for the Tenth Circuit was made and entered on April 2, 1979 (Appendix to Petition A-1). The Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit was filed with the Supreme Court on June 28, 1979.

STATUTES AND FEDERAL RULES INVOLVED

The pertinent portions of Rule 4 of the Federal Rules of Appellate Procedure and 28 U.S.C. §1291 are set forth in Appendix C and D to the Petition for Writ of Certiorari.

QUESTION PRESENTED FOR REVIEW

A jury verdict was returned against the petitioner. Subsequently, the petitioner filed a Motion for Judgment *non obstante veredicto* and the respondent filed a Motion for an Injunction. Thereafter, but prior to the trial court's ruling on the then pending motions, the petitioner filed a Notice of Appeal. The Trial Court denied the petitioner's Motion for Judgment *non obstante veredicto* and granted the respondent's Motion for an Injunction. On appeal, the Court of Appeals for the Tenth Circuit, upon the respondent's motion, concluded that the Notice of Appeal was premature and therefore the Court of Appeals was without jurisdiction to hear the merits of the case. The appeal was dismissed for want of jurisdiction. The question presented for review is:

When a Notice of Appeal is filed prior to the entry of final judgment, may the Court of Appeals accept the Notice of Appeal as if it were filed for review of the final judgment and exercise jurisdiction pursuant to 28 U.S.C. §1291, or does the premature filing of the notice of appeal deprive the Court of Appeals of jurisdiction?

STATEMENT OF THE CASE

This action was originally filed in the New Mexico State courts and removed to the United States District Court for the District of New Mexico. The respondent sought damages and injunctive relief for the breach of a contract. The petitioner asserted a counterclaim alleging violation of Federal Anti-Trust Laws and breach of contract.

The sequence of material facts following the jury trial is as follows:

1. On May 10, 1977, Judgment was entered on the jury verdict against the petitioner (Petition Appendix B-1).

2. On May 19, 1977, the petitioner filed his Rule 50(b) Motion for Judgment *non obstante veredicto* (hereinafter Motion for Judgment *n.o.v.*) (A. 9).

3. On May 19, 1977, the respondent filed its Motion for an Injunction (A. 12).

4. On June 10, 1977, the petitioner filed his Notice of Appeal (A. 14).

5. On June 14, 1977, the United States District Court for the District of New Mexico (hereinafter the Trial Court) denied the petitioner's Rule 50(b) Motion for Judgment *n.o.v.* (A. 15).

6. On August 9, 1977, the District Court entered an injunction (A. 16).

7. On September 7, 1977, the petitioner filed a Motion for Stay of Injunction.

8. On November 9, 1977, the District Court denied the Motion for Stay of Injunction.

9. No notices of appeal were filed other than the June 10, 1977 notice in paragraph 4 above.

On appeal, the petitioner urged a number of grounds for reversal of the Trial Court judgment. These issues, not pertinent herein, were thoroughly briefed by the parties. The respondent filed a motion to dismiss the appeal as being untimely. The motion was denied by the Court of Appeals (with leave to renew the motion at the time of oral argument). The motion was renewed by the respondent at oral argument, and it is on the basis of that motion that the Court of Appeals concluded that it was without jurisdiction to hear the appeal on the merits. The appeal was dismissed (Petition Appendix A-9).

ARGUMENT

The decision below should be reversed and the cause remanded to the Court of Appeals for a decision on the merits of the appeal filed by the petitioner, and briefed by the parties. To permit the dismissal of the appeal to stand would be to sanction an overly technical interpretation of procedural rules, stifling valuable legal rights of the petitioner herein. Such an action would be contrary to the rulings of a majority of the Circuit Courts of Appeal, and contrary to the spirit and purposes of the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure.

At the outset, the petitioner must note that he does not contest the fact that the judgment entered on the jury verdict on May 11, 1977 (P.A.B-1) was not a final judgment, as the petitioner subsequently filed a Motion for Judgment *n.o.v.* (A. 9). It is the petitioner's position that the filing of the Notice of Appeal prior to the court's ruling on petitioner's Motion for Judgment *n.o.v.* did not create a fatal impediment to the court's jurisdiction to review the case on its merits. Although the Notice

of Appeal was filed prematurely, it properly and adequately advised the respondent that an appeal was being taken. Since the Trial Court denied the Motion for Judgment *n.o.v.* (A. 9) and thus did not alter the issues on appeal, the Court of Appeals should have accepted jurisdiction. Had the Court of Appeals taken such action, the Court would not have prejudiced the rights of the petitioner.

In its decision, the overwhelming concern of the Court of Appeals is that the Finality Doctrine not be eroded. *Century Laminating, Ltd. v. Montgomery*, 595 F.2d 563 (10th Cir. 1979). The court begins with the premise that it has only such jurisdiction as is conferred by statute and that the court's jurisdiction is limited to appeals from final decisions. 28 U.S.C. §1291; *United States v. Nixon*, 418 U.S. 683, 690. The court continues by defining a final decision as ". . . one which ends the litigation on the merits and leaves nothing for the court to do but execute judgment." *Century Laminating, Ltd., supra* at 565.

Since the petitioner timely filed a Rule 50(b) Motion for Judgment *n.o.v.*, the court continues, the Trial Court retains jurisdiction to review its judgment, and thus the judgment was not final. Additionally, the petitioner's motion was one of those enumerated in Rule 4(a) of the Federal Rules of Appellate Procedure that terminates the running of time within which to file a Notice of Appeal. Thus, the petitioner's Notice of Appeal was prematurely filed. The court concludes that since the judgment was not final, the petitioner's Notice of Appeal constituted an attempt to appeal a non-final order, and as such was a nullity. It states that the petitioner could properly have perfected an appeal by filing a new notice within thirty days of the order denying the Motion for Judgment *n.o.v. Century Laminating, Ltd., supra* at 568.

The court continues that the danger it is seeking to dispel is the untimely ouster of a trial court from its jurisdiction, upon the filing of a premature Notice of Appeal. The court wishes to prevent Courts of Appeal from assuming trial court

functions, as such an action would violate the historical relationship between trial court and appellate court functions. Accordingly, the court concludes that the Finality Rule established by 28 U.S.C. §1291 is absolute, and the petitioner's Notice of Appeal was of no effect.

The Tenth Circuit fails to consider the fact that although the Notice of Appeal was premature, the Trial Court continued with the proceedings, apparently operating under the correct assumption that it had not been deprived of jurisdiction. Under the circumstances, since the matter ripened into a final judgment, no good purpose will be served by depriving the petitioner from an appeal on the merits.

A similar factual situation was presented to the Court of Appeals for the Ninth Circuit in *Ruby v. Secretary of the United States Navy*, 365 F.2d 385 (9th Cir. 1966). In *Ruby*, a Rule 12(b) motion was granted on June 17, 1965. On July 18, 1965, the plaintiff moved to vacate and set aside the order of dismissal. Plaintiff's motion was denied. On July 14, 1965, Ruby filed his Notice of Appeal, and on August 3, 1965, the court dismissed Ruby's complaint. In the Court of Appeals, the Ninth Circuit denied a motion to dismiss the appeal on grounds of prematurity, stating:

> Where, as here, the District Court correctly determines that its jurisdiction has not been ousted by a purported Notice of Appeal, because the latter was not taken from an appealable order, a Notice of Appeal directed to the non-appealable order will be regarded, as in *Firchau*, as directed to the subsequently entered final decision. *Ruby, supra* at 389.

In *Ruby*, the Trial Court understood that it retained jurisdiction notwithstanding the premature Notice of Appeal. In the case at bar, in light of the fact that the Notice of Appeal was filed while motions were pending, the Court understood that its

jurisdiction continued regardless of the premature notice. There was thus no reason to dismiss the petitioner's appeal, as the Tenth Circuit's concern regarding ouster did not materialize.

Also crucial to the evaluation of the present controversy is an understanding of the purpose of a Notice of Appeal. "The purpose of requiring the filing of a timely Notice of Appeal is to advise the opposing party that an appeal is being taken from a specific judgment and such notice should therefore contain sufficient information so as not to prejudice or mislead the appellee." *Markham v. Holt*, 369 F.2d 940, 942 (5th Cir. 1966). In essence, the notice is required to inform the litigants that the matter is not at an end; it is too soon to rely on the District Court's determination. As well, the requirement of filing a Notice of Appeal is mandatory and jurisdictional. *United States v. Robinson*, 361 U.S. 220.

Where the purposes of this particular pleading have been served and the intent of the appealing party is clear, an appeal should not be dismissed for a technical flaw, absent a showing of prejudice to the appellees. *Alexander v. Aero Lodge No. 735*, 565 F.2d 364, 371 (6th Cir. 1977). "In *Firchau, supra*, 345 F.2d at 271, the court suggested that the test was one of prejudice or its absence; that if the premature notice did not adversely 'affect substantial rights' of the prevailing adversary the appeal was saved; conversely, it would not be if substantial rights were thus impaired." *Eason v. Dickson*, 390 F.2d 585, 588 (9th Cir. 1968).

The Tenth Circuit has held that it is proper to permit a premature appeal where the judgment appealed from is not final in technical formality, as in *Morris v. Uhl and Lopez Engineering, Inc.*, 442 F.2d 1247, 1250 (10th Cir. 1971). The argument is being advanced by the respondent that, where judgment is not final because there is a motion enumerated in Rule 4(a) of the Federal Rules of Appellate Procedure pending at the time of the filing of the Notice of Appeal, a premature appeal should not be permitted to ripen, as the ruling on the

pending motion potentially could substantively change the form and content of the judgment. Under the circumstances of this case, the latter argument is specious as the petitioner's Motion for Judgment *n.o.v.* was denied. There was no substantive change in the form of the judgment, and the judgment was final at the time the appeal was considered by the Court of Appeals.

The Second, Third, Fifth, Eighth and Ninth Circuits support the petitioner's position with cases that are factually similar. In *Yaretsky v. Blum*, 592 F.2d 65 (2nd Cir. 1979), the appellants filed a Fed. R. Civ. P.59(e) motion to amend a preliminary injunction. During the pendency of the motion, the appellants filed a Notice of Appeal. The Rule 59(e) motion was subsequently denied. The appellees questioned the jurisdiction of the Second Circuit to hear the appeal on the basis of prematurity. The Court of Appeals concluded that notwithstanding the fact that the notice was filed while a Motion to Amend Judgment was pending, "the better rule is that in the absence of prejudice to the appellee, the court should treat a premature appeal as from a final judgment so as to avoid denial of justice, expense and inconvenience." *Yaretsky, supra*, 66. *Accord, Stokes v. Peyton's, Inc.*, 508 F.2d 1287 (5th Cir. 1975); *Hodge v. Hodge*, 507 F.2d 87 (3rd Cir. 1975); *In the Matter of the Grand Jury*, 541 F.2d 373 (3rd Cir. 1976); *Richerson v. Jones*, 551 F.2d 918 (3rd Cir. 1977).

The Eighth Circuit Court of Appeals, in the recent case of *Williams v. Town of Okoboji*, 599 F.2d 238 (8th Cir. 1979), ruled that an appeal would not be dismissed for prematurity, notwithstanding the fact that the Notice of Appeal was filed while a Fed. R. Civ. P.59(e) motion was under advisement. The court's sole consideration was whether or not the premature notice resulted in prejudice to the appellee.

Similarly, an objection to the jurisdiction of the court was overruled by the Ninth Circuit in *Song Jook Suh v. Rosenberg*, 437 F.2d 1098 (9th Cir. 1971). The objection was interposed on the grounds that the appellant's Notice of Appeal was pre-

mature, having been filed while a Fed. R. Civ. P. Rule 59 motion remained and undecided. The motion was subsequently denied. Circuit Judge Barnes concluded for the court:

> It is true that had the motion [Rule 59] been granted, the judgment would have been vacated and a new judgment ultimately entered. That judgment would then have been the only appealable judgment, and the Notice of Appeal previously filed would have been aborted. Not so here. The motion was denied; the judgment stands; it is the only appealable judgment, it is the one to which the notice refers. To hold, under such circumstances, that the Notice of Appeal is void, and that we have no jurisdiction, would be technical *in the extreme.* Neither the decisions of the Supreme Court nor those of this court require such a result. [Emphasis supplied]. *Song Jook Suh, supra,* at 1099. See *Firchau v. Diamond National Corp.*, 345 F.2d 269 (9th Cir. 1965); *Curtis Gallery and Library, Inc. v. United States*, 388 F.2d 358 (9th Cir. 1967); *Eason v. Dickson*, 390 F.2d 585 (9th Cir. 1968).

While the Ninth Circuit certainly must have been aware of the importance of maintaining the credibility of the Federal Rules of Appellate Procedure, as they are written, the court was not so blinded by the necessity of technical procedural uniformity as to permit the loss of valuable legal rights.

This court has previously not had the opportunity to address the issue herein presented, although it has provided some peripheral guidance. Most pertinent is the court's decision in *Foman v. Davis*, 371 U.S. 178.

In *Foman*, the court was presented with a factual situation wherein the petitioner's complaint was dismissed for failure to state a claim upon which relief might be granted. The day following the dismissal, the petitioner filed motions to vacate the

judgment and amend her complaint. Subsequently, but prior to a ruling on the motions, the petitioner filed a Notice of Appeal. Thereafter, the Trial Court denied petitioner's motions, and the petitioner filed a second Notice of Appeal from the denial. The Court of Appeals dismissed the first appeal as being premature, and determined that the second appeal was effective for the purposes of reviewing the court's denial of the petitioner's motions only.

In a decision delivered by Mr. Justice Goldberg, this court ruled that the second Notice of Appeal, although improperly phrased, was sufficient to review the underlying judgment of dismissal by the Trial Court. "With both notices of appeal before it (even granting the asserted ineffectiveness of the first), the Court of Appeals should have treated the appeal from the denial of the motions as an effective, although inept, attempt to appeal from the judgment sought to be vacated." *Foman, supra,* at 181. Among other reasons, the court based its decision on the fact that the defect in the second Notice of Appeal did not mislead or prejudice the respondent. As well, the court noted that the respondent was notified of petitioner's intent to appeal the Trial Court dismissal. Mr. Justice Goldberg in speaking for a unanimous court on this issue concluded:

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' *Conley v. Gibson,* 355 U.S. 41, 48. The rules themselves provide that they are to be construed 'to secure the just, speedy and inexpensive determination of every action.' Rule 1. *Foman, supra,* 181, 182.

The Court's decision in *Foman* is no less compelling in the case at bar.

In the present case, the petitioner intended to perfect an appeal as was recognized by the Tenth Circuit Court of Appeals. *Century Laminating, Ltd. v. Montgomery, supra,* at 569. The respondent was clearly alerted to the fact that the petitioner intended to appeal the judgment of the Trial Court. The respondent has not been heard to allege, nor has it shown, that prejudice will result should the appeal be permitted. The transcript has been prepared. The briefs have been written and need only be updated. No prejudice has resulted nor shall result. However, if the Court of Appeals is affirmed, the petitioner shall lose his right to appeal a judgment that he believes is legally deficient. Circuit Judge Thornberry's words in *Markham v. Holt,* 369 F.2d 940 (5th Cir. 1966) are instructive. "This court has consistently adhered to the policy of exercising all proper means to prevent the loss of valuable rights when the validity of an appeal is challenged not because something was done too late, but rather because it was done too soon." *Markham, supra,* at 942.

As is readily apparent from the number of Circuit Courts of Appeal that have addressed the issue present herein, Rule 4(a) of the Federal Appellate Rules of Procedure has presented prospective appellants with a technical, procedural stumbling block, through its ambiguity. One author has indicated that a premature appeal is regarded as the greatest hazard in attempting to file an appeal successively in the Tenth Circuit. Fromme, *Taking a Tenth Circuit Civil Appeal-Hints and Pitfalls to Avoid,* J. Kansas Bar A., Winter, 1974 p. 251. The petitioner strongly suggests that this Court, through its inherent rule making powers, could clarify the ambiguity of the rule presented herein prospectively. However, it would be improper to permit the Court of Appeals to take such action retrospectively by prohibiting the Petitioner's appeal on the merits.

The petitioner strongly urges that the better rule to adopt is one permitting a premature Notice of Appeal to ripen as to the final judgment, when the notice adequately informs the liti-

gants of an intended appeal and no prejudice results from the prematurity. Such a procedure would adequately take into consideration the underlying policy of the Finality Doctrine, while preserving the potential rights of the litigants.

CONCLUSION

For the reasons stated above, the petitioner respectfully prays that this Honorable Court reverse the actions of the Court of Appeals for the Tenth Circuit and remand the matter to that Court for consideration of the underlying appeal on the merits.

Respectfully submitted,

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In the

Supreme Court of the United States

1978 Term

No. 78-1933

STEVEN H. MONTGOMERY, Individually, and d/b/a
LAMINATING COMPANY OF COLORADO,
and d/b/a
AMERICAN LAMINATING COMPANY,
PETITIONER,
v.
CENTURY LAMINATING, LTD.,
RESPONDENT.

[redacted]

Suggestion of Mootness

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In the

Supreme Court of the United States

1978 Term

No. 78-1933

STEVEN H. MONTGOMERY, Individually, and d/b/a
LAMINATING COMPANY OF COLORADO,
and d/b/a
AMERICAN LAMINATING COMPANY,
PETITIONER,
v.
CENTURY LAMINATING, LTD.,
RESPONDENT.

MOTION TO DISMISS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

CENTURY LAMINATING, LTD., the Respondent herein, hereby moves the Court for an Order dismissing the Petition of the Petitioner, and in support thereof the Respondent states that this cause is moot and not meritorious of further consideration.

MOTION TO DISMISS

The Respondent in the above-entitled case files this Motion to Dismiss to advise the Court of certain facts which, in Respondent's view, render this cause moot and not meritorious of further consideration.

The question which Petitioner seeks to raise in his Petition for Certiorari, which was granted on October 9, 1979, is:

> Where a Notice of Appeal is filed prior to the entry of final judgment, may an Appellate Court accept the Notice of Appeal as if it were filed for review of the final judgment and exercise jurisdiction pursuant to 28 U.S.C. §1291, or does the premature filing of the Notice of Appeal deprive the Appellate Court of jurisdiction?

At the time Respondent submitted its Response to Petition for Writ of Certiorari herein, it was unaware that Rule 4 of the Federal Rules of Civil Procedure had just been amended. The changes thereto promulgated by this Court became effective on August 1, 1979. Rule 4 now states, in pertinent part:

> (4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); . . .the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above (emphasis added).

Here, there was a Rule 50 motion pending at the time the Notice of Appeal was filed in the District Court, and it was therefore filed prematurely. No new Notice of Appeal was filed after the denial of the Rule 50 motion. Thus, it is apparent that the change in Rule 4 of the Federal Rules of Appellate Procedure by this Court has answered the question raised by Petitioner in favor of Respondent. Although the Rule has no retroactive effect by its terms to cases prior to its enactment, this Court has no reason to be briefed any further on the merits of premature appeals nor to hear oral arguments on the issue. By promulgating the change in Rule 4, this Court has expressed its disfavor of premature appeals. This Court has already considered this issue thoroughly, and the expenditure of further time by this Court would not be warranted.

For these reasons, Respondent suggests that the issue sought to be raised has become moot and retrospective only and that therefore the Writ heretofore granted should be dismissed and the Writ requested by the Petitioner should be denied.

Respectfully submitted,

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In the

Supreme Court of the United States

1978 TERM

No. 78-1933

STEVEN H. MONTGOMERY, Individually and d/b/a LAMINATING COMPAY OF COLORADO, and d/b/a AMERICAN LAMINATING COMPANY,

Petitioner,

v.

CENTURY LAMINATING, LTD.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONSE OF PETITIONER TO SUGGESTION OF MOOTNESS

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In the

Supreme Court of the United States

1978 TERM

No. 78-1933

STEVEN H. MONTGOMERY, Individually and d/b/a LAMINATING COMPANY OF COLORADO, and d/b/a AMERICAN LAMINATING COMPANY,

Petitioner,

v.

CENTURY LAMINATING, LTD.,

Respondent

RESPONSE OF PETITIONER TO SUGGESTION OF MOOTNESS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

STEVEN H. MONTGOMERY, Individually, and d/b/a LAMINATING COMPANY OF COLORADO, and d/b/a AMERICAN LAMINATING COMPANY, the Petitioner herein, submit that the Suggestion of Mootness is unfounded in fact and law, and the appeal should be permitted to proceed to consideration on the merits by this Court.

RESPONSE OF PETITIONER TO SUGGESTION OF MOOTNESS

The Petitioner received the Respondent's Motion to Dismiss on November 26, 1979. On November 28, 1979, the Petitioner was informed by the Clerk of the Court that the Respondent's Motion would be treated as a Suggestion of Mootness. The Petitioner strongly urges that the issue presented is not moot and should not be dismissed on such a premise.

The Petitioner is not unaware that Rule 4 of the Federal Rules of Appellate Procedure has been amended effective August 1, 1979. The amendment does clarify the determination that courts should make in considering factual circumstances similar to those herein presented. However, the fact that the subject rule has been amended should not result in the dismissal of the present appeal on the grounds of mootness.

The ruling of the Tenth Circuit Court of Appeals in this controversy was based upon that Court's interpretation of Rule 4 prior to its recent amendment. Although the rule has been amended, the present controversy concerning the interpretation of the "old" Rule 4 must be resolved in order to justly and adequately determine the rights of the parties herein. This case must be decided on the basis of this Court's interpretation of the effect of the "old" rule. Taken in such light, the matter is not moot.

The Respondent suggests that because the rule has been clarified this Court need not consider the appeal. The Respondent fails to recognize that a dismissal for mootness would result in the loss by the Petitioner of his right to have the underlying appeal on the merits heard by the Tenth Circuit. There remains a case and controversy that is properly before this Court at this time.

Additionally, a dismissal at this time would unnecessarily impose a financial hardship upon the Petitioner. At great expense the Petitioner has prepared and filed the Brief of Petitioner and Appendix. A dismissal will render this preparation a total waste and drain of resources.

The Petitioner finds it curious that the Respondent chose to file Motion to Dismiss three days prior to the Petitioner's filing deadline for the brief, rather than filing the Motion shortly after this Court granted the Petition for a Writ of Certiorari. Certainly, the Respondent must have been aware of the amendment in the appellate rules at the time of the granting of the Petition.

Finally, the Petitioner must believe that this Court was aware that it had amended Rule 4 of the appellate rules at the time that it granted the Petition for a Writ of Certiorari. The Court itself must have believed, as the Petitioner argues herein, that there is a present, justiciable issue to resolve, notwithstanding the amendment of Rule 4 of the Federal Rules of Appellate Procedure.

For the reasons stated above, the Petitioner suggests that the Respondent's Suggestion of Mootness is without foundation.

Respectfully submitted,

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